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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,	)	2:11-cr-00427-HDM-CWH
	)	2:13-cv-01068-HDM
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
JOSE RIVERA-CARBAJAL,	)	
	)	
Defendant.	)	
_____	)	

On June 7, 2012, defendant pled guilty to a single-count indictment charging him with being a deported or removed alien unlawfully found in the United States. Defendant pled without the benefit of a plea agreement. On November 13, 2012, the court sentenced defendant to 51 months imprisonment. Defendant appealed. On June 21, 2013, the Ninth Circuit affirmed the court's judgment. Presently before the court is defendant's *pro se* motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (#43). The government has responded (#51). Defendant has not filed a reply, and the time for doing so has expired.

1 Pursuant to § 2255, a federal inmate may move to vacate, set  
2 aside, or correct his sentence if: (1) the sentence was imposed in  
3 violation of the Constitution or laws of the United States; (2) the  
4 court was without jurisdiction to impose the sentence; (3) the  
5 sentence was in excess of the maximum authorized by law; or (4) the  
6 sentence is otherwise subject to collateral attack. *Id.* § 2255.

7 Defendant advances two grounds for relief, both asserting  
8 ineffective assistance of counsel. Ineffective assistance of  
9 counsel is a cognizable claim under § 2255. *Baumann v. United*  
10 *States*, 692 F.2d 565, 581 (9th Cir. 1982). In order to prevail on  
11 a such a claim, the defendant must meet a two-prong test.  
12 *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the  
13 defendant must show that his counsel's performance fell below an  
14 objective standard of reasonableness. *Id.* at 687-88. "Review of  
15 counsel's performance is highly deferential and there is a strong  
16 presumption that counsel's conduct fell within the wide range of  
17 reasonable representation." *United States v. Ferreira-Alameda*, 815  
18 F.2d 1251, 1253 (9th Cir. 1986). "The question is whether an  
19 attorney's representation amounted to incompetence under  
20 'prevailing professional norms,' not whether it deviated from best  
21 practices or most common custom." *Harrington v. Richter*, - U.S. -,  
22 131 S. Ct. 770, 787-88 (2011). Second, the defendant must show  
23 that the deficient performance prejudiced his defense. *Strickland*,  
24 466 U.S. at 687. This requires showing that "there is a reasonable  
25 probability that, but for counsel's unprofessional errors, the  
26 result of the proceeding would have been different. A reasonable  
27 probability is a probability sufficient to undermine confidence in  
28 the outcome." *Id.* at 694.

1 **I. Ground One - Plea Agreement**

2 Defendant's first ground for relief asserts that his pretrial  
3 counsel, Johnathan Sussman, was ineffective with respect to a "fast  
4 track" plea agreement offered by the government. Ineffective  
5 assistance of counsel claims may be based on alleged deficiencies  
6 during the plea bargaining stage. See *Missouri v. Frye*, - U.S. - ,  
7 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, - U.S. -, 132 S. Ct. 1376  
8 (2012). The following facts relevant to defendant's claim appear  
9 from the record.

10 At a calendar call on March 27, 2012, the court granted the  
11 parties' stipulation to continue the trial from May 2, 2012, to  
12 June 5, 2012. According to defendant, "just minutes prior" to the  
13 calendar call, Sussman advised him that the government was offering  
14 him a "fast track" plea agreement. (Def. Mot. 12). On May 8,  
15 2012, the parties filed a memorandum indicating defendant intended  
16 to plead guilty without a plea agreement. A change of plea hearing  
17 was set for June 7, 2012. At the hearing, the court asked  
18 defendant whether his attorney had "been responsive to everything  
19 [he had] wanted him to do on [his] behalf?" *Id.* at 3. Defendant  
20 responded: "So far he is, yes, so far." *Id.* The government,  
21 represented by Robert Bork, noted for the record that it had  
22 extended a fast track plea offer to defendant but that defendant  
23 had rejected the offer:

24 MR. BORK: Your Honor, if I may, consistent with the  
25 Court's recent comments about your concern that  
26 you put on the record if there's been plea  
27 offers made, there was a plea offer made in  
28 this case under our Fast Track Program. The  
benefit would have been the binding plea, where  
the government would have moved for a two-level  
reduction; and, in all likelihood, would have  
also moved for the third point. So, that would

1 have been a three-point benefit down to offense  
2 level 19. But, that has been rejected.

3 THE COURT: All right. Did that -- did you get that plea  
4 agreement offered to you?

5 DEFENDANT: Yes, Your Honor.

6 THE COURT: And you discussed it with your attorney?

7 DEFENDANT: Yes, I did.

8 THE COURT: Now I don't want to know what you talked about,  
9 but was it your final decision? You made the  
10 final decision, did you, to reject that plea  
11 agreement?

12 DEFENDANT: Yes, Your Honor.

13 THE COURT: And did your attorney force you to make that  
14 decision?

15 DEFENDANT: No, Your Honor.

16 THE COURT: Did you do it of your own free will?

17 DEFENDANT: Yes, sir.

18 (Doc. #41 (Change of Plea Tr. 13-14)).

19 At his sentencing on November 13, 2012, defendant raised the  
20 issue of the rejected plea, saying:

21 Okay. Your Honor, the only reason my previous  
22 attorney -- the only reason that I didn't  
23 accept the deal there for 37 months is because  
24 he just offered me the Fast Track. He never  
25 told me how many months I was -- he was giving  
26 me -- I mean they were offering me until I came  
27 to the court, And then I say no. But I was  
28 never, I never aware of what they were going to  
give me or were offering me. The only time that  
they -- you know, they granted Fast Track, but  
that was it. And then they call me to court.  
And that was the only reason why I didn't  
accept it.

(Doc. #42 (Sentencing Tr. 37)). To this, the government responded:

Your Honor, just for the record, I make notes  
when I have hearings, and I will note that  
first in my file is an unexecuted plea  
agreement -- pardon me -- that has the offense  
level listed in there. We never agree to

1 criminal history category. And my notes show  
2 that when Mr. Sussman was his attorney back in  
3 June when he pled, that we waited for over an  
4 hour, and then he came out and told me that the  
5 defendant did not want the Fast Track. And so  
6 that's the records I have from that hearing.

7 *Id.* at 37-38. The government's representation that "we waited for  
8 over an hour" is corroborated by the record, which shows that  
9 although the change of plea hearing was scheduled for 10:30 a.m.,  
10 it did not begin until 11:44 a.m.

11 Defendant admits that he was aware of the plea offer but  
12 argues that he rejected it because Sussman was ineffective. While  
13 defendant's assertions of Sussman's ineffective acts and omissions  
14 are numerous, they all boil down to one simple allegation: that  
15 Sussman failed to timely and adequately explain the fast track plea  
16 offer. Defendant argues that if the offer had been sufficiently  
17 explained to him, he would have accepted it. Had defendant  
18 accepted the plea offer, his sentence would very likely have been  
19 lower than the sentence he is currently serving.

20 For several reasons, the court finds defendant's current  
21 contention that he rejected the plea offer because it wasn't  
22 sufficiently explained unsupported by the record. At his change of  
23 plea hearing, defendant expressly stated that he had discussed the  
24 fast track plea offer with Sussman, that he had rejected the offer  
25 of his own free will, and that he was satisfied with Sussman's  
26 representation. Defendant did not at that time indicate that he  
27 did not understand the plea agreement or that he needed more time  
28 to consider it. In addition, although defendant stated at  
sentencing that Sussman had not told him how many months he would  
get under the agreement, defendant has not alleged that he did not

1 understand that his sentence would be lower with a plea agreement.  
2 Finally, by pleading without the benefit of a plea agreement,  
3 defendant preserved his appellate rights. The fact that defendant  
4 subsequently appealed his sentence persuades the court that  
5 defendant made an informed and considered decision to take his  
6 chances on appeal rather than waive that right in exchange for a  
7 reduced sentence.

8 The court finds defendant's assertion that Sussman did not  
9 explain the plea agreement to him also palpably incredible. First,  
10 as just noted, defendant told the court that he had discussed the  
11 plea offer with Sussman. Further, more than two months passed  
12 between the time defendant learned of the plea offer and the time  
13 he changed his plea. Even if Sussman was difficult to reach during  
14 that time period, defendant had at least an hour to go over the  
15 plea agreement with Sussman before entering his change of plea.  
16 The court finds it highly improbable that during this time period  
17 Sussman did not explain the offer to defendant.<sup>1</sup>

18 In sum, the record clearly shows that defendant made a  
19 considered and informed decision to plead guilty without an  
20 agreement and that his decision to reject the plea offer was not  
21 based on ineffective conduct of his counsel. Ground One is  
22 therefore without merit.

## 23 **II. Ground Two - Sentencing Enhancement**

24 Defendant's second ground for relief challenges his sentencing  
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26 <sup>1</sup> There is no evidence before the court that defendant was compelled  
27 to accept or reject the plea offer at the March 27, 2012, hearing. However,  
28 even if he had been, his statements to the court at his change of plea  
hearing indicate that his decision to reject the plea offer was considered  
and informed.

1 and appellate counsel's failure to object to or appeal the 16-level  
2 enhancement for a crime of violence that was applied to his  
3 sentence.

4 Pursuant to United States Sentencing Guidelines §  
5 2L1.2(b) (1) (A) (ii), a 16-level enhancement is applied to a  
6 defendant's sentence if the defendant unlawfully entered or  
7 remained in the United States after being convicted of a "crime of  
8 violence." A crime of violence includes a conviction for a felony  
9 that is an "offense under federal, state or local law that has as  
10 an element the use, attempted use, or threatened use of physical  
11 force against the person of another." *Id.* app. n.1(b) (iii).

12 The conviction for which defendant received the enhancement  
13 was a battery constituting domestic violence, third offense, under  
14 Nev. Rev. Stat. §§ 200.481, 200.485 and 33.018. Under Nevada law,  
15 a battery constituting domestic violence, *id.* § 33.018, has as an  
16 essential element a "battery," which is defined as "any willful and  
17 unlawful use of force or violence upon the person of another," *id.*  
18 § 200.481. Because it was his third offense, the conviction was a  
19 felony. *Id.* § 200.485.

20 Defendant can establish neither ineffective assistance of  
21 counsel nor prejudice from counsel's failure to raise this issue.  
22 The judicially noticeable documents underlying defendant's  
23 conviction - which were in the possession of the United States  
24 Probation Office and available to defendants' counsel - clearly  
25 showed that defendant had admitted to conduct that qualified as a  
26 crime of violence under § 2L1.2(b) (1) (A) (ii). In his written  
27 guilty plea agreement, defendant "agree[d] to plead guilty to  
28 BATTERY CONSTITUTING DOMESTIC VIOLENCE - 3RD OFFENSE . . . as more

1 fully charged in the charging document" and admitted "the facts  
2 which support all the elements of the offense(s) to which I now  
3 plead as set forth in the charging document". The charging  
4 document (the amended information) charged defendant with  
5 "grabbing" his wife "by the hair and wrist, forcing her to the  
6 floor, and dragging [her] across the floor." These documents thus  
7 clearly show that the facts underlying defendant's conviction  
8 involved "the use of physical force against the person of another."

9 Counsel considered the documents underlying defendant's  
10 conviction in deciding whether and how to object to the 16-level  
11 enhancement. (See Doc. #53 (Riddle & Shell Decls.)). Further, at  
12 the time of defendant's sentencing, both the guilty plea and the  
13 charging document would have been properly considered by the court  
14 in evaluating whether defendant's conviction was a crime of  
15 violence. See *United States v. Gomez-Leon*, 545 F.3d 777, 784 (9th  
16 Cir. 2008). Because the documents show that defendant's conviction  
17 qualified as a crime of violence, any objection or appeal to the  
18 contrary would have been rejected. Therefore, counsel were not  
19 ineffective for failing to raise the issue nor was defendant  
20 prejudiced by their conduct in this regard. See *Shah v. United*  
21 *States*, 878 F.2d 1156, 1162 (9th Cir. 1989) (an attorney's failure  
22 to raise a meritless legal argument is not ineffective assistance  
23 of counsel).

### 24 **III. Certificate of Appealability**

25 The standard for issuance of a certificate of appealability  
26 calls for a "substantial showing of the denial of a constitutional  
27 right." 28 U.S.C. § 2253(c). The Supreme Court has interpreted  
28 U.S.C. § 2253(c) as follows:



1 Where a district court has rejected the  
2 constitutional claims on the merits, the  
3 showing required to satisfy §2253(c) is  
4 straightforward: The petitioner must  
5 demonstrate that reasonable jurists would find  
6 the district court's assessment of the  
7 constitutional claims debatable or wrong. The  
8 issue becomes somewhat more complicated where,  
9 as here, the district court dismisses the  
10 petition based on procedural grounds. We hold  
11 as follows: When the district court denies a  
habeas petition on procedural grounds without  
reaching the prisoner's underlying  
constitutional claim, a COA should issue when  
the prisoner shows, at least, that jurists of  
reason would find it debatable whether the  
petition states a valid claim of the denial of  
a constitutional right and that jurists of  
reason would find it debatable whether the  
district court was correct in its procedural  
ruling.

12 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v.*  
13 *Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court  
14 further illuminated the standard for issuance of a certificate of  
15 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The  
16 Court stated in that case:

17 We do not require petitioner to prove, before  
18 the issuance of a COA, that some jurists would  
19 grant the petition for habeas corpus. Indeed,  
20 a claim can be debatable even though every  
21 jurist of reason might agree, after the COA has  
22 been granted and the case has received full  
23 consideration, that petitioner will not  
24 prevail. As we stated in *Slack*, "[w]here a  
district court has rejected the constitutional  
claims on the merits, the showing required to  
satisfy § 2253(c) is straightforward: The  
petitioner must demonstrate that reasonable  
jurists would find the district court's  
assessment of the constitutional claims  
debatable or wrong."

25 *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).

26 The court has considered the issues raised by defendant with  
27 respect to whether they satisfy the standard for issuance of a  
28 certificate of appeal and determines that none meet that standard.

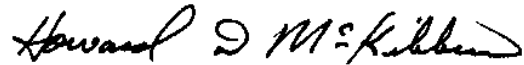
1 The court will therefore deny defendant a certificate of  
2 appealability.

3 **Conclusion**

4 Defendant has failed to establish that any of his attorneys  
5 rendered ineffective assistance of counsel. To the extent any of  
6 defendant's specific arguments have not been not addressed in this  
7 order, the court finds them to be without merit. Defendant's  
8 motion to vacate, set aside, or correct sentence pursuant to 28  
9 U.S.C. § 2255 (#43) is accordingly **DENIED**.

10 IT IS SO ORDERED.

11 DATED: This 4th day of March, 2014.

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13 UNITED STATES DISTRICT JUDGE  
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